SUPREME COURT, U. S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 383

PETER YING AND WONG CHAI LIANG,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General
of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

ROBERT F. KENNEDY, Attorney General
of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming a judgment of the District Court.

Opinions Below

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix at pp. 23-29. The opinion of the District Court is reported at 180 F. Supp. 618, and is set forth in the Appendix at pp. 31-34.

Jurisdiction

The judgment of the Court of Appeals was entered on April 27, 1961. A Petition for Rehearing was timely filed by the Petitioners below on May 11, 1961, and was denied on June 2, 1961. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether petitioners may be deported under warrants of deportation which fail to specify the place of deportation in the face of (a) administrative regulations which require the district director of the Immigration and Naturalization Service to designate the country to which an alien shall be deported; (b) Section 243(a) of the Immigration and Nationality Act which requires the Attorney General to direct the deportation of aliens to specified countries; and (c) the 5th Amendment to the Constitution of the United States.

2. Whether the British Crown Colony of Hong Kong may be regarded as a "country" within the meaning of the deportation provisions of the Immigration and Nationality Act.

Statutes and Regulations Involved

Section 243(a) and (b) of the Immigration and Nationality Act, 66 Stat. 212, 213, 8 U.S.C. 1253(a) and (b), provide:

> "Countries to which aliens shall be deported—(a) acceptance by designated country; deportation upon non-acceptance by country.
>
> "The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country

promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto adjacent to the United States unless such alien is a native, citizen, subject or national or, had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

"(1) to the country from which such alien last entered the United States;

"(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
"(3) to the country in which he was born;
"(4) to the country in which the place of his birth is situated at the time he is ordered deported;
"(5) to any country in which he resided prior to entering the country from which he entered the United States;
"(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
"(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

"(b) Deportation during war.
"If the United States is at war and the deportation, in accordance with the provisions of subsection (a) of this section, of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

"(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or
"(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to

a country or any political or territory subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country."

8 Code of Federal Regulations (1958 ed.) provides under Part 243, in pertinent part, as follows:

"Part 243—Deportation of Aliens in the United States

§ 243.1 Issuance of warrants of deportation, country to which alien shall be deported; cost of detention; care and attention of alien—(a) Issuance. A warrant of deportation shall be based upon the final order of deportation and shall be issued by a district director or an immigration officer acting for him.

"(b) Determination of place and cost of detention, and necessity for attendants. District directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported, and to determine when an alien's mental or physical condition requires the employment of a person to accompany the alien.

"§ 243.2 Finality of decision. No appeal shall lie from the decision of the district director in the exercise of the authority described in § 243.1.

"§ 243.3 Execution of warrants of deportation—(a) Taking alien into custody. Upon the issuance of a warrant of deportation or as soon thereafter as the circumstances of the case require, the alien, if not in the physical custody of the Service, shall be taken into custody under the authority of such warrant of deportation and deported."

Statement

Petitioners are each natives and citizens of China who entered the United States as nonimmigrant crewmen and have overstayed their permission to remain (R. 13). Orders of deportation have been entered against them upon the ground that they remained longer than permitted. Following the entry of the orders of deportation, the District Director of the Immigration and Naturalization Service issued warrants, on April 30, 1959, as to petitioner Ying, and on July 17, 1958, as to petitioner Liang, directing that the petitioners be taken into custody under the authority of such warrants and deported "pursuant to law" (R. 6, 9). The warrants failed to state the country to which petitioners were to be deported. On October 9, 1959, they were each served with a "Notice to Alien of Country to Which His Deportation Has Been Directed and Penalty for Reentry Without Permission" which stated:

> "Pursuant to the order of deportation in your case and Section 243 of the Immigration and Nationality Act, your deportation to Hong Kong has been directed * * *." (R. 2, 5.)

Following the notice of the proposed deportation, petitioners instituted the action in the United States District Court below to obtain a judgment declaring (1) that the warrants of deportation are in violation of the administrative regulations, of the Immigration and Nationality Act, and of the Fifth Amendment to the Constitution of the United States, and that the order directing their deportation to Hong Kong is void in that Hong Kong is not a country within the meaning of the Immigration and Nationality Act (R. 2, 3).

Upon cross motions for summary judgment, the District Court entered summary judgment for the Attorney

General (R. 16), ruling that the petitioners are not prejudiced by the failure of the warrants to specify the place to which they are to be deported and that in the sense in which the term is used in the Immigration and Nationality Act, Hong Kong is a country (R. 15). On appeal to the United States Court of Appeals for the District of Columbia Circuit, that Court concluded that neither the administrative regulations nor the statute require that the country of deportation be set forth in the warrant of deportation and that the notice with which the petitioners were otherwise furnished afforded them ample time to assert any claimed right or privilege. That Court further held that Hong Kong is a country within the meaning of the pertinent section of the statute (Appendix pp. 28, 29).

A petition for rehearing was filed below (R. 28 et seq.) upon two grounds: (1) That the opinion of the Court of Appeals assumed erroneously that "the determination of the country of deportation depends upon facts to be ascertained, conclusions to be reached, and decisions to be made by the Attorney General after * * * the warrant of deportation (has been) issued * * *" (Appendix p. 27); and (2) That if the Court of Appeals were correct that the country to which petitioners are to be deported need not be specified on the warrant of deportation the administrative record establishes a failure by the District Director to comply with the requirement of 8 C.F.R. 243.1(b) that he designate the country to which aliens are to be deported. The petition for rehearing was denied without opinion. (R. 37.)

Reasons for Granting the Writ

Two issues of recurring importance in the administration of the deportation laws are posed by the decision of the Court below.

The first is whether the *warrant of deportation*, which is the administrative device by which the Immigration and Naturalization Service takes a deportable alien into custody and removes him to a foreign country [8 Code of Federal Regulations 243.3 (1958 ed.)], must specify on its face the country to which an alien is to be deported.

The second is whether Hong Kong, a Crown Colony of the United Kingdom of Great Britain, may be regarded as a "country" within the meaning of Section 243(a) of the Immigration and Nationality Act, 66 Stat. 212, 213, 8 U.S.C. 1253(a).

I

A. The requirement that a warrant of deportation name the country to which an alien shall be deported has been imposed judicially at least since 1912. [*Ex Parte Yabucanin*, 199 Fed. 365, 366 (D. Mont., 1912), and *Ex Parte Callow*, 240 Fed. 212 (D. Colo., 1916)]. See also *Lewis* v. *Frick*, 233 U.S. 291, 304; *Wenglinsky* v. *Zurbrick*, 282 U.S. 798, reversing 38 F. 2d 985 (C.A. 6); *Bellaskus* v. *Crossman*, 335 U.S. 840, reversing 164 F. 2d 412 (C.A. 5) (Cf. dissenting opinion 164 F. 2d 414); *United States ex rel. Karamian* v. *Curran*, 16 F. 2d 958 (C.A. 2); *Saksagansky* v. *Weedin*, 53 F. 2d 13 (C.A. 9).

The Immigration and Naturalization Service has accepted and complied with this early judicial mandate through successive changes in the deportation provisions of the immigration statutes—not only under the Immigration Act of 1907, 34 Stat. 898, 904, 905, which was the statute in force when *Ex Parte Yabucanin* and *Ex Parte Callow* were decided, but under Sections 19 and 20 of the Immigration Act of 1917, 39 Stat. 874, 890, 8 U.S.C. 155, 156; under the amendatory Act of July 13, 1943, 57 Stat. 553, 8 U.S.C. 156 (1946 ed.) [which has been recodified in the present Section 243(b) of the Immigration and Nation-

ality Act of 1952, 66 Stat. 212, 213, 8 U.S.C. 1253(b)]; and under the amendatory Section 23 of the Internal Security Act of 1950, 64 Stat. 987, 8 U.S.C. Supp. V, 156(a) [which, with changes not relevant here, has been recodified in the present Section 243(a) of the Immigration and Nationality Act, 66 Stat. 212, 213, 8 U.S.C. 1253(a)].

The Immigration Manual issued by the Immigration and Naturalization Service for the guidance of its personnel provided in February, 1951, *after* the changes now set forth in the Immigration and Nationality Act of 1952 had been accomplished by the Act of July 13, 1943, and by Section 23 of the Internal Security Act, that the warrant of deportation:

> "is * * * to state the place to which the alien is to be deported, and at whose expense deportation is to be effected." See Page 7100.1.

Apart from the decisional authority of the long-accepted judicial determinations in *Ex Parte Yebucanic*, *supra*, and *Ex Parte Callow*, *supra*, and the well-established administrative practice, Congress itself conducted an exhaustive study of immigration and deportation procedures preceding the enactment of the Immigration and Nationality Act of 1952. See Senate Report 1515, 81st Cong., 2nd Sess. (1950). That report thoroughly examined the functions of the order and the warrant of deportation (see pp. 624-635, especially pp. 628-29). While it contains a discussion of various problems affecting the execution of warrants of deportation, it reveals no disapproval of the issuance of warrants which specify the country to which an alien is to be deported.[1] Cf. *National Labor Relations Board* v. *Gulf*

[1] Although the present statute refers in Section 242 to "orders of deportation" in place of the term "warrant" in the 1917 statute, the legislative history of the language in that section, as well as in Section 243, indicates that the change in nomenclature was not intended to require

Gin Co., 340 U.S. 361, 365; *Helvering* v. *R. J. Reynolds Co.*, 306 U.S. 110, 115; and especially for Congressional approval of immigration practices, *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345.

B. It is against this backdrop of judicial precedent, administrative practice, and Congressional approbation that the Court below held that the administrative regulations, the statute, and the due process clause of the Fifth Amendment—none of them—require that the warrant under which an alien is to be removed from the United States to a foreign country need specify the country to which the alien is to be deported.

The relevant provision in the statute is Section 243(a), 66 Stat. 212, 213, 8 U.S.C. 1253. The language there provides:

> "The deportation of an alien in the United States provided for in this chapter * * * shall be directed by the Attorney General to a country promptly designated by the alien * * * to any country of which such alien is a subject(,) national, or citizen * * * (or to various other countries) * * *."

No directive to accomplish the execution of a final order of deportation in implementation of Section 243 of the statute is provided for in the administrative regulations or procedures other than the warrant of deportation.[2] See Form I-205. (R. 6, 9.)

an abandonment of the use of "warrants of deportation" as the means of accomplishing the deportation of aliens who have been ordered deported. See Immigration and Naturalization Service Analysis of S. 3455, Sections 241, 242, 243 (On file, U. S. Supreme Court Library), 81st Cong., 1st Sess. In fact, of course, the Service has continued to use such warrants notwithstanding the absence of an express reference to them in the statute.

[2] Not a "directive" but notice to the alien is provided on "Notice to Alien of Country to Which His Deportation Has Been Directed and Penalty for Reentry Without Permission", Form I-294; and notice to

The regulation which implements Section 243 of the statute is 8 C.F.R. 243 (1958 ed.). It provides in subsection 1(a) that the "warrant of deportation * * * shall be issued by a district director or an immigration officer acting for him"; in subsection 1(b) that "district directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense, an alien in the United States shall be deported"; and in subsection 3(a) that "upon issuance of a warrant of deportation * * * the alien * * * shall be taken into such custody under the authority of such warrant of deportation and deported."

That warrant is addressed to "Any officer or employee of the Immigration and Naturalization Service" over the signature of the District Director and states:

> "I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to take into custody and deport the said alien pursuant to [illegible] at the expense of ———."

and provides further:

> "For so doing this shall be your sufficient warrant." (See R. 6, 9)

Thus, the warrant sets forth on its face a designation of the financial obligor for the expense of the deportation in conformity with 1(b) of the regulation, but it omits any directive as to the place of deportation, which 1(b) also re-

transportation lines is provided for detained aliens on "Notice to Detain, Deport, or Remove Aliens, Form I-259; and for aliens not in detention on a "Notice to Transportation Line Regarding Non-Detained Aliens", Form I-288.

quires, other than to state that the deportation shall be "pursuant to law."

The Court below assumed erroneously that the warrant of deportation under the present statute and regulations serves the function of maintaining "actual or constructive custody of the alien (after deportability has been established) * * * until the Attorney General has determined the country of deportation and then the alien is deported to such country."[3] Appendix, pp. 26-27.

Its opinion stated that the warrant of arrest under which an alien is taken into custody at the outset of a deportation proceeding "has spent its force when the final order of deportation is entered". Appendix, p. 26.

8 C.F.R. 242.2(a) (1958 ed.), however, provides that custody of an alien may be had under a "warrant of arrest" from the "commencement of any proceeding * * * and up to the time the respondent becomes subject to supervision" (pursuant to Section 242(d) of the statute). An alien does not become "subject to supervision" until a final order of deportation has been outstanding for more than six months. 8 U.S.C. 1252(d). And then he may not be held in custody, actual or constructive, *United States* v. *Witkovich*, 353 U.S. 195, 198, unless as an incident to actual deportation.

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[3] It has been said, as if it were a timeless and inexorable procedure, that "the warrant of deportation issues (immediately) after it has been finally determined administratively that the alien is deportable (Cf. R. 7, 10) (and that) at that time the country of deportation cannot be authoritatively known * * *." See Brief in Opposition to Petition for Writ of Certiorari filed by the Solicitor General in *Chung Fu Sheung et al.* v. *Rogers*, No. 393, October Term, 1960, p. 11. Inasmuch as the directive of the warrant is "take (the alien) into custody and deport" (R. 6, 9), there would appear to be no occasion to issue it until the country of deportation is "authoritatively known". Cf. *Wing Wong* v. *United States*, 163 U.S. 228, and *United States ex rel. Marcello* v. *Nabers*, United States Supreme Court, October Term, 1955 (Order of Mr. Justice Black, dated September 16, 1955).

Thus, contrary to the premise of the Court below, it is the warrant of arrest which serves to maintain custody of an alien after the entry of a final order of deportation for a period of six months. Thereafter, an "order of supervision" serves to assure the alien's availability for deportation. The warrant of deportation manifestly does not perform the function which the Court of Appeals ascribed to it.

Its mistaken analysis of the function of the warrant of deportation led the Court of Appeals to conclude that the "country of deportation should not, and indeed, could not be stated in (the) warrant". Appendix, p. 27. This conclusion, based as it is upon a false premise, is error.

C. The present mechanism of executing the final order of deportation, which the Court below has upheld, is of obvious importance to the alien as well as to the Immigration and Naturalization Service. While this Court has had occasion to pass upon the validity of warrants of deportation which omitted proper findings (Cf. *Mahler* v. *Eby*, 264 U.S. 32) and has determined the validity of warrants which failed to specify a proper place of deportation (Cf. *Wenglinsky* v. *Zurbrick*, 282 U.S. 798, and *Bellaskus* v. *Crossman*, 335 U.S. 840), it has not yet reviewed the precise question at issue here: whether an alien may be removed to a foreign country by officers of the Immigration and Naturalization Service under a warrant of deportation which fails to specify the country of deportation.

The significance of the issue here is heightened by the fact that the Immigration and Naturalization Service, after some forty years of compliance, has abandoned an administrative practice which was adopted under judicial compulsion and which has since been glossed with the approval of Congress. Cf. *Abel* v. *United States*, 362 U.S. 217, 233, 234.

A determination by this Court of the propriety of the

new warrant of deportation procedure seems especially justified because of the frequently precipitate deportations effected by the Immigration and Naturalization Service. (Cf. *Heikkila* v. *Barber*, 164 F. Supp. 587 (N. D. Calif., 1958); *Spinella* v. *Brownell*, C. A. No. 2497-55, United States District Court for the District of Columbia; *Marcello* v. *Kennedy*, C. A. No. 1035-61, United States District Court for the District of Columbia, 194 F. Supp. 748, 750.)

The importance of the question in the implementation of the deportation laws justifies review of the decision below not only to determine whether the warrants here failed to comply with the administrative regulations, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, and *Bridges* v. *Wixon*, 326 U.S. 135, 153; and whether they conform with the statute, adopted in express knowledge of the long-standing prior practice to specify the country of deportation on the warrant, *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365, but, in addition, to determine whether notwithstanding other forms of notice, a warrant which fails to specify the country of deportation is a "sufficient warrant" for an employee of the Immigration and Naturalization Service to take an alien "into custody and deport" him to a foreign country (R. 6, 9). Compare this with the specificity required for search warrants, *Boyd* v. *United States*, 116 U.S. 616, and *Marron* v. *United States*, 275 U.S. 192, 196, where it is held that "nothing is to be left to the discretion of the officer executing the warrant", and for warrants of commitment, *Hill* v. *United States*, 298 U.S. 460, 465. Here, by contrast, the executing officer is given no direction on the warrant which empowers him to deport an alien but has wide-ranging discretion to determine where to deport the alien, his only guide being that it be "pursuant to law". The issue whether this comports

with due process, apart from all other questions, justifies examination of the decision below by this Court. Cf. *Kolkosis* v. *Esperdy*, 191 F. Supp. 765 (S.D. N.Y.).

II

This Court has not previously definitively determined the gauge of the term "country" in a deportation statute.[4] In *United States ex rel. Meusevich* v. *Tod*, 264 U.S. 134, 136, 137, however, the Court, while reserving the issue whether the term encompasses *de jure* or *de facto* territory, held that in the antecedent statute, the word *country* "is used * * * to designate in general terms the *state* which at the time of deportation includes the place from which the alien came". (Emphasis supplied.)

The decision below departs from this concept. For it holds that Hong Kong, plainly not the "state which includes the place from which the alien came, but a "local and partially autonomous government" (Appendix, p. 28), could be deemed a country.

Two grounds were given for its holding: (1) a "consideration of the context in which (the term, country) is found" and (2) the "purpose of the Act * * * to reduce the number of undeportables by increasing the number of places or countries to which (a deportable alien) might be sent * * * ", *ibid*, p. 28.

On either ground, the Court's finding seems dubious.

Section 243(a) of the statute enumerates nine alternative places of deportation. In each instance in this subsection the place of deportation is expressly stated to be a *country*.

The statute, however, goes on to provide for deportation

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[4] It has in a tax statute, *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, 7; and in tariff measures, *Stairs* v. *Peaslee*, 18 How. 521, 526; *Pearce* v. *Stranahan*, 205 U.S. 257, 265.

to places other than countries under special and limited circumstances. Section 243(h) provides that:

> "If the United States is at war and the deportation, in accordance with the provisions of subsection (a), of any (deportable) alien * * * shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible * * * such alien may * * * be deported * * * to a country or *any political or territorial subdivision thereof* which is proximate to the country of which the alien is a citizen or subject * * *." (Emphasis supplied.)

If the statutory context of the term is to be a determinant in deciding whether the British Crown Colony of Hong Kong is to be deemed a *country*, the decision below is obviously erroneous.

To reach its construction, the Court below had to ignore familiar rules of statutory construction: that it is the duty of the courts "to give effect, if possible, to every clause and word of a statute", *National Labor Relations Board* v. *Jones and Laughlin*, 301 U.S. 1, 30; *Montclair* v. *Ramsdell*, 107 U.S. 147, 152; that every provision in a statute is presumed to have been inserted for a definite purpose, *McBroom* v. *Scottish Investment Co.*, 153 U.S. 318, 323; *Market Company* v. *Hoffman*, 101 U.S. 112, 115-116; that unless there is no alternative, no provision should be read out of a statute which "as a matter of ordinary English speech" has been included, *United States* v. *Hood*, 343 U.S. 148, 151, *Postmaster General* v. *Early*, 12 Wheat. 136, 147; that "however inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment' ", *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107; that "specific terms prevail over the general in the same or another

statute which might otherwise be controlling", *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208; that "the presence of * * * a provision in one part (of a statute) and its absence in the other is an argument against reading it as implied * * * ", *United States* v. *Atchison T. & S.F.R. Co.* 220 U.S. 37, 44.

For if deportation to Hong Kong, a political and territorial subdivision of the United Kingdom of Great Britain, is to be sustained, the effect is to eliminate from the statute the provision of Section 243(b) which limits deportation to such localities to a time of war, and then only if deportation to the countries set forth in Section 243(a) should be inadvisable or impossible, and solely to a territorial or political subdivision "which is proximate to the country of which the alien is a citizen or subject".

In addition, the Court of Appeals below passed over the legislative history of the place of deportation provisions in the present statute.

Section 20 of the antecedent Immigration Act of 1917, 39 Stat. 874, 890, 8 U.S.C. 156, provided for deportation to certain specified countries or, alternatively, to the foreign port at which the alien embarked for the United States.

This provision, as noted above, supra, pp. 8, 9, was twice amended prior to its recodification in the Immigration and Nationality Act of 1952.

The first amendment, the Act of July 13, 1943, 57 Stat. 553, 8 U.S.C. 156 (1946 ed.), now appearing in Section 243(b) of the present statute, was adopted within weeks following a decision of the Fourth Circuit confronted with the problem of deserting alien seamen during wartime (p. 132), in *Delany* v. *Moraitis*, 136 F. 2d 129 (May 27, 1943). The Court there, applied the term *country* "to a situation which Congress did not foresee" (p. 132). It defined the term *country* broadly enough to permit the deportation of

a Greek seaman "to the custody of the Greek government-in-exile in England" but physically to a Greek vessel at a time when the territory of Greece was occupied by German military forces, *ibid.* pp. 130, 133.

The 1943 amendment, in terms, overruled the *Moraitis* decision. In place of that holding, which would have permitted deportation to the custody of a foreign government as deportation to a *country* regardless whether it is in possession of territory in which to receive him (see p. 131), Congress required deportation in the *Moraitis* situation either "to the country in which is located that government in exile, if that country will permit him to enter its territory", or, "if the recognized government of the foreign country is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, * * *".

The second amendment, contained in Section 23 of the Internal Security Act of 1950, 64 Stat. 987, 1010, 8 U.S.C. Supp. V, 156(a), deleted from Section 20 of the Immigration Act of 1917, the "foreign port at which such aliens embarked for the United States" as a place to which an alien could be deported. Substituted in its place was the phrase "the *country* in which is located the foreign port at which such alien embarked for the United States * * *".

Each of these amendments was reenacted, without change relevant here, in the present statute.

The decision below utterly ignores the modifications which Congress adopted in the statute. It permits the deportation of the petitioners to Hong Kong, the *port* at which they embarked for the United States (R-13), notwithstanding the fact that the statute was amended expressly to require deportation to the *country* in which that port is located, namely the United Kingdom of Great Britain.

Nor is the Court below correct in its assumption that a ruling that Hong Kong is not a *country* "would tend to defeat" the purpose of the statute. The sole effect of such a holding would be to remove the Attorney General of the United States as the person to determine where, within the territories comprising the United Kingdom, the petitioners are to be sent, and to vest that decision in Great Britain, as the country in which Hong Kong is located and as the country with which the United States maintains international relations, and, indeed, to which this government communicated its request to accept the petitioners (R. 13).

The proper definition of the term country in the Immigration and Nationality Act, being presented in the execution of every warrant of deportation, is obviously of fundamental and continuing importance.[5] Whether the Attorney General has the statutory power to deport aliens to specific cities, to political or territorial subdivisions, or to colonial possessions of foreign countries is a question which deserves authoritative resolution by this Court.[6] Cf. *Chan Chaca* v. *Esperdy*, 285 F. 2d 353 (C.A. 2).

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[5] The Immigration and Naturalization Service deported 6,529 aliens in 1960. Annual Report, Immigration and Naturalization Service, 1960, p. 55.

[6] The Annual Report indicates that 57 aliens were deported to Hong Kong in 1960. No other "political or territorial subdivisions" are listed as *countries*, except for those areas which may be included in "Other Europe", "Other Asia", "West Indies" and "Central America". *Ibid.*

Conclusion

The decision below is based upon demonstrably incorrect assumptions. It has been reached in disregard of the familiar principles of statutory construction. It presents two questions which are important to aliens and to the administrative agency in the enforcement of warrants of deportation. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be granted.

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SEPTEMBER 1961

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,696

Peter Ying and Wong Chai Liang, Appellants

v.

Robert F. Kennedy, Attorney General of the United States, Appellee

Appeal from the United States District Court for the District of Columbia

Decided April 27, 1961

Mr. David Carliner, with whom *Mr. Jack Wasserman* was on the brief, for appellants.

Mr. Abbott J. Lebau, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before: WILBUR K. MILLER, Chief Judge, and PHILLIPS, Senior United States Circuit Judge for the Tenth Circuit,* and DANAHER, Circuit Judge.

PHILLIPS, *Circuit Judge*: Ying and Liang, hereinafter called the aliens, are citizens and nationals of China. They entered the United States lawfully as crewmen, but became unlawfully within the United States by reason of having overstayed their shore leave. Deportation proceedings were instituted against each of them and in each proceeding an order was entered that the alien "be deported from the United States in the manner provided by law."

The Liang order was entered July 17, 1958, and on the same day a warrant was issued for the arrest and deportation of Liang. The Ying order was entered on April 30, 1959, and on the same day a warrant was issued for th

* Sitting by designation pursuant to Title 28 U.S. Code § 294(d).

arrest and deportation of Ying. Neither warrant specified the country to which deportation should be made. Each commanded that the alien should be taken "into custody" and deported "pursuant to law."

The regularity of the proceedings, the fact that each alien is deportable, and the validity and finality of the orders of deportation are admitted. Relief is sought here only on the grounds (1) that the warrants are invalid because they failed to designate the country of deportation, and (2) that Hong Kong, which was designated as the country of deportation, is not a country within the meaning of the Immigration and Nationality Act (1952), 66 Stat. 163.[1]

Neither alien exercised his privilege under § 243(a) of the Act, 8 U.S.C.A. § 1253(a), to designate the country to which the Attorney General should direct his deportation.

Absent a prompt exercise by an alien of his right to designate a country to which his deportation shall be directed, it becomes the duty of the Attorney General under § 243(a) of the Act to direct deportation "to any country of which" the "alien is a subject national, or citizen if such country is willing to accept him into its territory." If the government of such country does not advise, within three months following the date of original inquiry or within such future period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether it will or will not accept the alien into its territory, then it becomes the duty of the Attorney General under § 243(a) of the Act in his discretion and without priority or preference because of the order they are set out in such Section, to direct deportation of the alien "to the country": (1) from which he last entered the United States; (2) in which is located the foreign port at which he embarked for the United States; (3) in which he was born; (4) in which the place of his birth is situated at the time he is ordered deported; (5) which had sovereignty over his birth place at the time of his birth; or (6) to any country in which he resided prior to entering the country from which he entered the United States; "or" (7) "if deportation to

[1] Hereinafter called the Act.

any of the foregoing places or countries is impractical, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory."

On October 9, 1959, Ying was served with a notice which stated, "pursuant to the order of deportation in your case and Section 243 of the Immigration and Nationality Act, your deportation to Hong Kong has been directed." A like notice stating that his deportation to Hong Kong had been directed was served on Liang, but the record does not show the date of that notice.

On September 2, 1959, Notice Form I-166 was served upon Liang and on October 9, 1959, it was served on Ying. The Ying notice stated that arrangements had been made for his deportation to Hong Kong on October 22, 1959, and directed him to report at a designated time and place completely ready for deportation. The Liang notice stated that arrangements had been made for his deportation to Hong Kong on September 18, 1959, and directed him to report at a designated time and place completely ready for deportation.

Hong Kong, a British Crown Colony, is the place from which each alien entered the United States and the British Consul General in San Francisco, prior to the issuance of the notices above referred to, had advised the Attorney General that the authorities in Hong Kong had agreed to accept each of such aliens as deportees.

The aliens instituted a declaratory judgment action seeking an adjudication (1) that Hong Kong was not "a country" within the meaning of "243(a) of the Act, and (2) that each warrant of deportation was invalid because it failed to designate the country to which the alien named therein was to be deported. Summary judgment was entered in favor of the Attorney General and the aliens have appealed.

I. Were the warrants defective because they failed to state the country to which the alien was to be deported? The aliens rely upon *Ex parte Yabucanin*, D.C. Mont., 190 Fed. 365 and *Ex parte Calhoun*, D.C. Colo., 240 Fed. 212. Those cases held that a warrant which failed to state the country to which deportation was to be made was de-

fective. However, those cases were decided under the Immigration Act of February 20, 1907, 34 Stat. 898. Under that Act deportation of an alien was to be only "to the country whence he came" and the Act specifically provided for a warrant for the arrest and deportation of the alien, to be issued by the Secretary of Commerce and Labor. The Act which governs the present proceeding makes no provision for a warrant of deportation.[2] Rather, § 242(c) of the Act provides for a final order of deportation.

The applicable regulations do provide for a warrant of deportation to be "based upon the final order of deportation" (8 C.F.R. § 243.1(a)) and under it the alien if not already "in the physical custody of the Service" is taken into custody (8 C.F.R. § 243.3). But neither the Act nor the regulations expressly require either the order or the warant to designate the country to which the alien is to be deported and for reasons we shall hereinafter undertake to state, neither impliedly so require.

Under the warrant provided for in § 242(a) of the Act custody of the alien is obtained and thereafter maintained until the final determination of deportability. It has spent its force when the final order of deportation is entered. When such order has been entered, the warrant provided for in the regulations is issued and under it the alien, if not already in physical custody, is taken into custody and thereafter actual or constructive custody of the alien is maintained until the Attorney General has determined the country of deportation and then the alien is deported to such country.

Section 242(c) of the Act provides that the Attorney General shall have a period of six months from the date of the final order of deportation, or, if judicial review is had, from the date of the final order of the court, within which to effect the alien's departure from the United States; and that during such period, at the Attorney Gen-

[2] Section 242(a) of the Act, 8 U.S.C.A. § 1252, provides for a warrant for the arrest and placing in custody of the alien pending final determination of his deportability. Such a warrant precedes the order of deportation and plainly is not a warrant of deportation.

eral's discretion, the alien may be detained, released on bond, or released on such other condition as the Attorney General may prescribe. And, under § 243(a) of the Act, deportation is not limited as in the 1907 Act to the place whence the alien came, but to one of several countries, namely, a country promptly designated by the alien, if it is willing to accept him and the Attorney General does not conclude deportation to such country would be prejudicial to the interests of the United States, or a country of which the alien is a native, citizen, subject or nation, provided it is willing to accept him, and if to neither of those, one of seven other countries specified in § 243(a) of the Act, as determined by the Attorney General in his discretion. Thus, it will be seen that the determination of the country of deportation depends upon facts to be ascertained, conclusions to be reached, and decisions to be made by the Attorney General after the final order of deportation has been entered and the warrant of deportation issued.

Since, under the procedures provided for in the Act, the country of deportation is not determined until after the final order of deportation has been entered and the warrant of deportation, provided for in the regulations, has been issued, it must follow that the country of deportation should not, and, indeed, could not be stated in such order or warrant.

In our opinion, the notice given to each alien, which definitely stated the country to which he was to be deported, and the notice given to Lieng on September 2, 1959, and to Ying on October 9, 1959, (Form I-166) which again advised each of them of the country to which he was to be deported, and which also stated the time and place each should report for deportation, comported with the procedures intended by and fully met the requirements of the Act; gave to each alien good and sufficient notice of the country to which he was to be deported; and afforded each alien ample time to assert or take steps to protect any claimed right or privilege.

We conclude the warrants were free from defect and valid.

II. Is Hong Kong a country within the meaning of that word as used in § 243(a) of the Act? "Country" is not a word of art with a fixed technical meaning. Rather, it is an ambiguous term and its meaning in § 243(a) of the Act must be arrived at by a consideration of the context in which it is found and the purposes of the Act.[3]

The word may describe a state in the international sense, that is, a state having the status of an international person, or "it may mean a foreign government which has authority over a particular area or subject matter, although not an international person but only a component part, or a political subdivision, of the larger international unit." *Burnet* v. *Chicago Portrait Company*, 285 U.S. 1, 5.

Since its cession to Great Britain in 1941, as confirmed by the Treaty of Nanking of 1842, Hong Kong has been a British Crown Colony. It is comprised of the island of Hong Kong, itself, the Kowloon Peninsula on the mainland and certain lesser surrounding islands. It is governed by a royal governor, who is advised by a 12-member executive council and by a 17-member appointive legislature whose procedures follow those of the British House of Commons. We deem it unnecessary to determine the precise distribution of political power between Hong Kong's local and partially autonomous government and that of the United Kingdom. Suffice it to say that Hong Kong has authority to determine whether it will accept a deported alien from the United States. That authority was recognized by the action of the Consul General of Great Britain when he made inquiry of the legal authorities at Hong Kong as to whether they would accept into Hong Kong's territory the aliens to be deported in the instant case.

A primary purpose of the Act was to reduce the number of undeportables by increasing the number of places or countries to which an alien under a final order of deportation might be sent. That purpose is plainly manifest by the language of the Act itself. To hold Hong Kong

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[3] Burnet v. Chicago Portrait Company, 285 U.S. 1, 5, 6; Chan Chuen v. Esperdy, 2 Cir., 285 F.2d 353, 354; Rogers v. Cheng Fu Sheng, 108 U.S. App. D.C. 115, 116, 280 F.2d 663, 664, *cert. denied*, 364 U.S. 891.

to be a country within the meaning of § 243(a), supra, will tend to achieve such purpose. To hold otherwise would tend to defeat it.

We conclude that Hong Kong is a country within the meaning of § 243(a). Our conclusion is supported by two recent decisions in the Second Circuit.[4]

The judgment is affirmed.

[4] See Chan Chuen v. Esperdy, 2 Cir., 285 F.2d 353, 354 and Mo Chung Shing v. Murff, D.C. N.Y., 168 F. Supp. 381.

Filed, April 27, 1961, Joseph W. Stewart, clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960.

Civil 2927-59

No. 15,696

Peter Ying and Wong Chai Liang, Appellants,

v.

Robert F. Kennedy, Attorney General of the United States, Appellee.

Appeal from the United States District Court for the District of Columbia.

Before: WILBUR K. MILLER, Chief Judge, and PHILLIPS, Senior United States Circuit Judge for the Tenth Circuit, and Danaher, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge PHILLIPS.

Dated: APRIL 27, 1961.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2927-59

Peter Ying and Wong Chai Liang, Plaintiffs,

v.

William P. Rogers, Attorney General of the United States Defendant.

OPINION

This is an action against the Attorney General for a declaratory judgment. The two plaintiffs are nationals and citizens of China who entered the United States as nonimmigrant crewmen, overstayed their authorized time, and were ordered deported. The findings of deportability are not challenged. The defendant has moved for summary judgment and plaintiffs also have so moved.

The warrants of deportation direct that plaintiffs be deported "pursuant to law" but plaintiffs contend that the warrants are void because they do not specify the country to which plaintiffs are to be deported. It is conceded that each plaintiff received formal notice that the "country to which his deportation has been directed" is "Hong Kong." However, plaintiffs assert that Hong Kong is not a country within the meaning of the Immigration and Nationality Act. These questions of law are the only issues involved.

The act of June 27, 1952, 8 U.S.C. 1253, governs as to the countries to which aliens may be deported. Among these is the "country from which such alien last entered the United States." The Act does not define the word "country". At the time plaintiffs entered the United States they came from Hong Kong, a British Crown Colony, where they had resided for years. The British Consulate General in San Francisco has advised that consent has been granted by the authorities in Hong Kong for the acceptance of plaintiffs as deportees.

In support of their claim that Hong Kong is not a country

within the meaning of the immigration and Nationality Act plaintiffs cite *Cheng Fu Sheng* v. *Rogers*, 177 F.Supp. 281, D.C.D.C. The plaintiffs in that case were natives and citizens of China, and in 1952 had entered the United States from Formosa for the purpose of receiving military training with the United States Air Force. They finished their studies but failed to leave. The question was whether they might be deported to Formosa, the government there being willing to receive them. The court pointed out that China ceded Formosa to Japan in 1895, that in the Japanese Peace Treaty effective 1952 Japan renounced all right, title and claim to Formosa, but that neither in that treaty nor in any other has there been any cession to China of Formosa although the United States recognizes the Government of the Republic of China (the Nationalist Government) as the legal government of China and that such government exercises authority over Formosa. Then the court concluded

> "* * * that since under existing law, deportation may be effected only to a specific country, in this instance China, and since Formosa is not regarded by the Department of State as part of China as a country, the plaintiffs may not be deported to Formosa."

This court does not regard the ruling in *Sheng* as persuasive.

It is well settled that statutes should be construed, if possible, so as to effectuate the purpose intended and to avoid absurd consequences. *Delang* v. *Moraitis*, 4 Cir., 136 F.2d 129, 131. Where language is susceptible of a construction which preserves the usefulness of a statute, the judicial duty rests upon the court to give expression to the intendment of the law. *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315, 333. *United States* v. *American Trucking Association*, 310 U.S. 534, 543.

In the instant case the Government proposes to deport from this country the two alien plaintiffs who are here contrary to our laws and to place them where they were immediately preceding the time they entered the United States, that is, in Hong Kong. This proposal may be carried out if Hong Kong is a "country" under that provision of the Act declaring that deportation of an alien

may be made to the "country from which such alien last entered the United States."

A definition of the word "country" was given by the Supreme Court in *Baroti v. Chicago Portrait Co.*, 285 U.S. 1 (1932), as follows:

> "The word 'country,' in the expression 'foreign country,' is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, it may describe a foreign State in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of the family of nations; or it may mean a foreign government which has authority over a particular area or subject-matter, although not an international person but only a component part, or a political subdivision, of the larger international unit. The term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation."

The *Baroti* case concerned the claim of a corporation to an income tax deduction under a law allowing as such deduction part of income taxes paid "to any foreign country." The question involved was whether New South Wales constituted a "foreign country" within the meaning of the meaning of the applicable law. It was held that New South Wales did so constitute a foreign country. New South Wales then was and is a state of the Commonwealth of Australia. The rationale of the court in *Baroti* as to the meaning of the word "country" has significance here. The adoption of that rationale in the instant case would meet the requirement that the sense in which language is used in a statute must be determined by reference to the purpose of the particular legislation. Moreover, such a legislation would tend to achieve and not to defeat the aims of the 1952 Immigration and Nationality Act.

It is the view of this court that Hong Kong is a country within the meaning of the Immigration and Nationality Act of 1952 and that plaintiffs may be deported to Hong Kong.

The plaintiffs are not prejudiced by the fact that the warrants of deportation do not specify the place to which they are to be deported as it is clear to plaintiffs and the appropriate authorities that plaintiffs are to be deported to Hong Kong.

The motion of the defendant for summary judgment will be granted and the motion of plaintiffs for summary judgment will be denied.

/s/ BURNITA SHELTON MATTHEWS,
Judge.

February 10th, 1960.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 2927-59

Peter Ying and Wong Chai Liang, Plaintiffs,

v.

William P. Rogers, Attorney General of the United States
Defendant

ORDER

This case having come on for hearing upon defendant's motion for summary judgment or in the alternative to dismiss and upon plaintiffs' cross motion for summary judgment, and the Court having considered said motions, opposition thereto, exhibits filed therewith, and having heard oral argument; and it appearing to the Court that plaintiffs have received notice they are to be deported to Hong Kong, and it further appearing to the Court that Hong Kong is a country within the meaning of the Immigration and Nationality Act of 1952, in accordance with the memorandum opinion of the Court filed herein on February 19, 1960, it is by the Court this 15th day of February, 1960,

ORDERED that plaintiffs' cross motion for summary judgment be, and the same is hereby, denied; and the defendant's motion for summary judgment be, and the same is hereby, granted; and that the complaint be and the same is hereby, dismissed.

BURNITA SHELTON MATTHEWS,
Judge.